95-1585

(1)

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

MURRAY COLVARD,

Petitioner,

vs.

FULTON-DEKALB HOSPITAL AUTHORITY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Certiorari should be granted to resolve the conflict among the circuits as to whether a *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985), hearing can properly be held before a person who is not making the decision as to discharge.

2. Certiorari should be granted to reaffirm the *Loudermill* holding that lack of pre-deprivation due process is not cured by post-deprivation due process.

PARTIES TO THE PROCEEDINGS

Petitioner Murray Colvard is a resident of Decatur, Georgia. He was the Plaintiff in the lower court proceedings of this case and was the Appellant before the United States Court of Appeals for the Eleventh Circuit.

Respondent Fulton-DeKalb Hospital Authority is a publicly owned authority in the City of Atlanta, Georgia, which runs the Grady Memorial Hospital. The Authority was a Defendant in the lower court proceedings of this case and was the Appellee before the United States Court of Appeals for the Eleventh Circuit.

There are no other parties to this action.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On December 28, 1995, the United States Court of Appeals for the Eleventh Circuit issued a summary affirmance of the District Court. There is no opinion. There is an opinion of the United States District Court for the Northern District of Georgia.

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the United States Court of Appeals for the Eleventh Circuit and its judgment of December 28, 1995. That judgment affirmed the lower court's grant of summary disposition. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1983 provides:

> § 1983. Civil action for deprivation of rights
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress

> applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner was a supervisor at the Grady Memorial Hospital run by respondent in Atlanta, Georgia, with a property interest in his job since he could not be fired except in limited circumstances. He was fired for alleged acts of sexual harassment which he denied.

Prior to being discharged, he had no opportunity to meet with the decisionmaker for the Hospital except after the termination notice had already been typed up. The only meeting he received prior to termination was with Pauline Farris, who was the employee advocate. Her job was to

> simply investigate the case, hear both sides – all sides, and come to some conclusion and make a recommendation.

Indeed, it wasn't much of a hearing, because Ms. Farris was still investigating the case at the time.

After Ms. Farris finished with questioning petitioner, she had a meeting with the hospital decisionmaker, wherein it was determined that petitioner should be terminated. As of that time, petitioner had not met with any of the hospital decisionmakers.

At no time prior to his discharge did petitioner know that Ms. Farris was going to make a recommendation based on the erroneous statement that he had previously

sexually harassed an employee. Such erroneous statement was made without talking to petitioner even after she found nothing on petitioner's personnel file to support such a claim.

Petitioner filed a multi-count complaint, alleging violations of 42 U.S.C. § 1983. The lower court granted summary judgment against plaintiff on August 15, 1994. The Court of Appeals affirmed the holding of the lower court on December 28, 1995.

Petitioner now seeks the review of this Court.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO WHETHER A *CLEVELAND BOARD OF EDUCATION V. LOUDERMILL*, 470 U.S. 532 (1985), HEARING CAN PROPERLY BE HELD BEFORE A PERSON WHO IS NOT MAKING THE DECISION AS TO DISCHARGE.

In a line of cases beginning with *Thurston v. Dekle*, 531 F.2d 1264, 1273 (5th Cir. 1976), the Court noted:

> Effective rebuttal must give the employee the right to respond in writing to the charges made and to respond orally before the official charged with the responsibility of making the termination decision.

Accord Glenn v. Newman, 614 F.2d 467, 472 (5th Cir. 1980). That had been the law of the Eleventh Circuit until the instant case. *Nicholson v. Gant*, 816 F.2d 591, 598 (11th Cir.

1987). Three other Circuits have reached opposite holdings. *Loudermill v. Cleveland Board of Education*, 844 F.2d 304, 311 (6th Cir. 1988); *Los Angeles Police Protective League v. Gates*, 907 F.2d 879, 891 (9th Cir. 1990); *Riccio v. County of Fairfax, Virginia*, 907 F.2d 1459 (4th Cir. 1990).

In *Cleveland Board of Education v. Loudermill*, 470 U.S. at 553, Justice Brennan in a concurring opinion agreed that a decision must be made by a decision maker. This Court has never resolved the issue.

Petitioner does not contend that he is entitled to respond in writing prior to discharge. *Cleveland Board of Education v. Loudermill, supra*, says the opposite. He does contend that he is entitled to at least meet with the decisionmaker. This Honorable Court should resolve this conflict among the circuits.

II.

CERTIORARI SHOULD BE GRANTED TO REAFFIRM THE LOUDERMILL HOLDING THAT LACK OF PRE-DEPRIVATION DUE PROCESS IS NOT CURED BY POST-DEPRIVATION DUE PROCESS.

The District Judge held below:

> Furthermore, even if pretermination due process was inadequate, plaintiff's rights to procedural due process were not violated because the procedural remedies available to plaintiff post-termination . . . satisfied the requirements of procedural due process. *McKinney v. Pate*, 20 F.3d 1550, 1562 (11th Cir. 1994) ('procedural due process violations do not become complete "unless and until the state refuses to provide due process" ').

(Page 5). The Eleventh Circuit has evidently agreed. This petitioner had thought that this Honorable Court in *Cleveland Board of Education v. Loudermill, supra,* had laid this issue to rest, 470 U.S. at 546 and fn. 12. Indeed, this Court explicitly rejected an argument that post-termination process could in some manner cure a pre-termination failure.

> Petitioner had thought the law well-established that absent the necessity of quick action by the State or the impracticality of providing any pre-deprivation process a post-deprivation hearing . . . would be constitutionally inadequate.

Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982).

Properly confined to the issue of pre-termination due process, it is clear that neither *Parratt v. Taylor,* 451 U.S. 527 (1981), nor *McKinney* affects a public employee's § 1983 claim that he was denied pretermination due process. Years after *Parratt* was decided, in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 105 S.Ct. 1487 (1985), this Honorable Court held that a tenured public employee is entitled to notice and a hearing BEFORE he is fired. "This principle requires some kind of a hearing prior to the discharge of an employee who has a constitutionally protected property interest in his employment." In this regard, the Court held that, "The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." 105 S.Ct. at 1495. Petitioner did not receive this process.

Cleveland Board of Education v. Loudermill, specifically holds that providing public employees due process prior

to being fired is NOT "impracticable", and is not exempted form the general rule requiring government to provide pre-deprivation process. Instead, it is quite "practicable." ("[A]ffording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays." The existence of a state-provided post-termination hearing does NOT, therefore, vitiate a *Loudermill* pretermination due process claim. *Parratt* did NOT hold that the mere availability of State post-deprivation remedy eviscerates a § 1983 procedural due process claim:

> In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a post-deprivation tort remedy to compensate for the taking. . . .
>
> Contrary to the dissent's view of *Parratt* and *Hudson* [*v. Palmer*, 468 U.S. 517 (1984)], those cases do not stand for the proposition that in every case where a deprivation is caused by an unauthorized departure from established practices, state officials can escape § 1983 liability simply because the State provides tort remedies. *Zinermon v. Burch*, 110 S.Ct. 975, 985, 987, 990 n.20 (1990).

The erroneous argument that the mere existence of a state post-deprivation remedy is sufficient to sure a prior due process violation is further undermined by numerous holdings of this Honorable Court. In *Memphis Light and Gas v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 1565 (1978), a homeowner's power was shut off by a public utility company without sufficient advance notice. This Honorable Court specifically held that existence of a state tort

remedy did not preclude relief under § 1983, where due process was "practicable." 98 S.Ct. 1565-1566. An employee's interest in his or her job is entitled to at least the same level of protection. *See also Bell v. Burson*, 402 U.S. 1586, 91 S.Ct. 1586 (1971) (pre-hearing suspension of driver's license impermissible notwithstanding possibility of subsequent state court action); *Sniadach v. Family Finance*, 395 U.S. 337, 89 S.Ct. 1820 (1969) (pre-hearing seizure of wages impermissible notwithstanding possibility of subsequent state court action); *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972) (pre-hearing seizure of personal property impermissible notwithstanding possibility of subsequent state court action).

This Honorable Court should take this opportunity to reaffirm its *Cleveland Board of Education v. Loudermill* holding that the lack of pretermination due process can never be cured by post-termination due process, and thus *Parratt* holding is completely irrelevant under *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982).

CONCLUSION

There are numerous governmental decisions every single day that affect an employee's property interest in his/her job. The whole purpose of *Loudermill* was to provide a standard of due process both before the deprivation was accomplished and afterwards. *Loudermill* simply does not contemplate that every employee property interest case will be relegated to state court whether the deprivation was accomplished with no prior process or not.

In *Loudermill*, this Honorable Court noted the importance of appealing to the decisionmaker's discretion before the deprivation. That should mean that an employee is able to communicate with that person. As Petitioner has shown above, there is a split in Circuit authority as to whether a hearing before a decisionmaker is even required. For this reason, Petitioner submits that this Honorable Court should resolve the conflict.

Respectfully submitted,

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APPENDIX A – JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED DECEMBER 28, 1995

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-8948

D. C. Docket No. 1:93-CV-2410-GET

MURRAY COLVARD,

Plaintiff-Appellant,

versus

FULTON-DEKALB HOSPITAL AUTHORITY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(December 28, 1995)

Before EDMONDSON, DUBINA and BARKETT, Circuit Judges.

PER CURIAM:

AFFIRMED. ***See*** **11th Cir. R. 36-1.**

"Costs taxed against plaintiff-appellant."

Judgment Entered: December 28, 1995
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNobel
Deputy Clerk

ISSUED AS MANDATE: 1-30-96

APPENDIX B – OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED AUGUST 15, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MURRY COLVARD	)	
	)	
Plaintiff	)	CASE NO.
V.	)	1:930-cv-2410-GET
	)	
FULTON-DEKALB HOSPITAL AUTHORITY	)	
	)	
	)	(Filed Aug. 15, 1994)
Defendant	)	

ORDER

The above-styled matter is presently before the court on plaintiff's motion for partial summary judgment [Docket No. 6] and defendant's motion for summary judgment [Docket No. 11].

Standard of Review

Courts should grant summary judgment when "there is no genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party must "always bear the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any' which it believes demonstrate the absence of a genuine

issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). That burden is "discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325; *see also U.S. v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir. 1991).

Once the movant has met this burden, the opposing party must then present evidence establishing that there is a genuine, material issue of fact. *Celotex*, at 325. The nonmoving party must go beyond the pleadings and submit evidence in the form of affidavits, depositions, admissions and the like, sufficient to demonstrate that if allowed to proceed to trial, a jury might return a verdict in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). If he does so, there is a genuine issue of fact that requires a trial. In making a determination of whether there is a material issue of fact, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255; *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1529 (11th Cir. 1987). However, an issue is not genuine if it is unsupported by evidence or if it is created by evidence that is "merely colorable" or is "not significantly probative." *Anderson*, at 249-50. Similarly, a fact is not material unless it is identified by the controlling substantive law as an essential element of the nonmoving party's case. *Id.* at 248. Thus, to create a genuine issue of material fact for trial, the party opposing the summary judgment must come forward with specific evidence of every element essential to his case with respect to which (1) he has the burden of proof and (2) the summary judgment movant has made a

plausible showing of the absence of evidence on the necessary element. *Celotex*, at 323.

Facts

In light of the above standard, the court finds, for the purposes of the summary judgment motions only, the following pertinent facts.

In 1990, plaintiff began working for defendant as a Supervisor of Housekeeping. It is undisputed that plaintiff has a property interest in his employment. Defendant has a written policy prohibiting sexual harassment which states that sexual harassment is grounds for termination. Defendant also has a grievance procedure through which employees may appeal disciplinary action taken against them.

On January 9, 1992, Chandra Gaddis, one of the employees that plaintiff supervised, reported to Department Manager Williams that plaintiff had sexually harassed her. Williams referred the matter to Pauline Farris, the Employee Advocate who conducts investigations in sexual harassment cases. On January 10, 1994, Farris contacted plaintiff to meet with her. That same day, Farris and plaintiff met, and Farris explained the charges Gaddis had made against plaintiff and asked for plaintiff's response. Plaintiff denied the charges. After finishing her investigation, Farris recommended that plaintiff be fired. Barbara Bilek, Vice President of the Hospital, Tom Arrendale, Director over Housekeeping and Williams approved Farris's recommendation. On January 13, 1992, Williams gave plaintiff a termination notice.

Subsequently, plaintiff filed a grievance through the Hospital's grievance procedure. First, plaintiff met with Bilek who declined to reverse the decision to terminate plaintiff's employment. Plaintiff then had a hearing before the Hospital Grievance Committee which consists of both management and employee representatives. At the hearing, plaintiff had the right to counsel, the right to cross-examine witnesses and the right to present evidence. Plaintiff, however, could not subpoena witnesses, and no witness, including plaintiff, testified under oath. Plaintiff complains that he wanted a Mr. Gray to testify but that Mr. Gray would not testify voluntarily. Plaintiff admits that he did not ask defendant or the Grievance Committee to compel Mr. Gray to testify, nor did plaintiff raise the issue at the hearing. The Grievance Committee issued a fourteen page opinion in which they set forth the evidence presented at the hearing and its findings. The Grievance Committee upheld the decision to terminate plaintiff.

Plaintiff claims that defendant has violated his rights to procedural and substantive due process. Plaintiff moves for summary judgment on his claim that he was denied pretermination procedural due process. Defendant moves for summary judgment on all of plaintiff's claims.

Discussion

A. PROCEDURAL DUE PROCESS.

(1). Pretermination Due Process

Plaintiff claims he was not given sufficient pretermination procedural due process. The United States Supreme Court has held that due process requires " 'some kind of hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). However, the *Loudermill* Court emphasized that a full evidentiary hearing is not required prior to termination. The employer need only given the employee notice of the charges against him and an opportunity to respond. *Id.* at 546. *See also Hatcher v. Board of Public Educ.*, 809 F.2d 1546, 1553 (11th Cir. 1987). Because it is undisputed that on January 10, 1992, Farris gave plaintiff notice of the charges against him and a chance to respond to those charges, the court finds that plaintiff's rights to pretermination procedural due process have not been violated. Furthermore, even if pretermination due process was inadequate, plaintiff's rights to procedural due process were not violated because the procedural remedies available to plaintiff post-termination (as discussed below) satisfied the requirements of procedural due process. *McKinney v. Pate*, 20 F.3d 1550, 1562 (11th Cir. 1994) ("procedural due process violations do not become complete 'unless and until the state refuses to provide due process.' "). *See also Adams v. Sewell*, 946 F.2d 757, 765 (11th Cir. 1991). Accordingly, plaintiff's motion for partial summary judgment on plaintiff's pretermination procedural due process claim

[Docket No. 6] is DENIED and defendant's motion for summary judgment on plaintiff's pretermination procedural due process claim is GRANTED.

(2). Post-Termination Due Process

Plaintiff contends that the post-termination hearing held by the Grievance Committee did not meet the requirements of procedural due process because Plaintiff could not subpoena witnesses and because witnesses at the grievance hearing were not under oath. It is undisputed, however, that plaintiff had a formal hearing before an impartial decisionmaking body (the Grievance Committee) and that plaintiff had the right to counsel, the right to cross examine witnesses and the right to present evidence. Accordingly, the grievance hearing satisfied the most important requirements of procedural due process. *See Adams*, 946 F.2d at 765-66 (emphasizing the necessity of an impartial decisionmaker and the opportunity to cross examine witnesses to due process).

Plaintiff argues that the requirements of procedural due process cannot be satisfied if witnesses are allowed to testify without being under oath. However, "[t]he 'judicial model of an evidentiary hearing' is not a steadfast constitutional requirement. *See Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S. Ct. 893, 909 (1976). Moreover, [plaintiff] does not allege that any of the witnesses perjured themselves, nor does he indicate how he was prejudiced by their failure to take oaths." *Bowens v. N.C. Dep't of Human Resources*, 710 F.2d 1015, 1020 (4th Cir. 1983). Because plaintiff did not object at the hearing to the failure to put witnesses under oath and because plaintiff

has not shown that he was prejudiced by witnesses being unsworn, the court finds the absence of sworn testimony at plaintiff's hearing did not deprive plaintiff of procedural due process.

Plaintiff also claims he was deprived of procedural due process because he was not able to subpoena witnesses. Specifically, plaintiff alleges that Mr. Gray, an employee with defendant, had information which would have been helpful to plaintiff's case but that Mr. Gray would not testify voluntarily. Plaintiff, however, has presented no evidence to show that plaintiff ever asked either defendant or the Grievance Committee to compel Mr. Gray's presence at the hearing. Furthermore, plaintiff has never shown that Mr. Gray's testimony would have affected the outcome of the hearing. Because plaintiff did not raise the issue of Mr. Gray's testimony at the hearing and because plaintiff has not shown prejudice as a result of Mr. Gray's absence, the court finds that plaintiff has not raised an issue of constitutional deprivation of due process. The court does not reach the issue of whether lack of subpoena power can raise due process questions in other circumstances.

Accordingly, because plaintiff had the right to counsel, the right to cross examine witnesses and the right to present evidence before an impartial decisionmaker, the court finds that plaintiff's post-termination hearing satisfied the requirements of procedural due process. Defendant's motion for summary judgment on plaintiff's procedural due process claim is GRANTED.

(3). Writ of Certiorari Pursuant to O.C.G.A. § 5-4-1

Defendant argues that, regardless of the process plaintiff received at the grievance hearing, plaintiff does not have a claim for violation of procedural due process because plaintiff had the opportunity to appeal the Grievance Committee's decision to a Georgia Superior Court through writ of certiorari. O.C.G.A. § 5-4-1. In *McKinney*, 20 F.3d at 1563, the Eleventh Circuit explained that even if plaintiff suffered a procedural deprivation at his post-termination hearing, plaintiff has not suffered a violation of his procedural due process rights unless the state refuses "to make available a means to remedy the deprivation."

In Georgia, O.C.G.A. § 5-4-1 provides, in pertinent part, "[t]he writ of certiorari shall lie for the correction of errors committed by any inferior judicatory or any person exercising judicial powers." The Eleventh Circuit has held that O.C.G.A. § 5-4-1 provides adequate constitutional procedural protection. *Lee v. Hutson*, 810 F.2d 1030, 1033 (11th Cir. 1987). Because the Hospital's Grievance Committee exercised judicial powers when it decided plaintiff's grievance, *see Salter v. Thomaston*, 200 Ga. App. 536, 537, 409 S.E.2d 88 (1991) (finding a City Manager's decision to terminate an employee was subject to review by writ of certiorari pursuant to O.C.G.A. § 5-4-1); *Baxter v. Fulton-DeKalb Hosp. Authority*, 764 F.Supp. 1510, 1519 (N.D. Ga. 1991), the court finds that the State of Georgia provided plaintiff with adequate procedural protections. Accordingly, the availability of writ of certiorari provides an alternative ground to GRANT defendant's motion for

summary judgment on plaintiff's procedural due process claim.

B. SUBSTANTIVE DUE PROCESS

Plaintiff also brings a claim for violation of substantive due process. In *McKinney*, 20 F.3d at 1560, the Eleventh Circuit held that substantive due process claims are not available to state employees claiming loss of a property interest in employment. Accordingly, defendant's motion for summary judgment on plaintiff's substantive due process claim is GRANTED.

SUMMARY

For the above stated reasons, plaintiff's motion for partial summary judgment [Docket No. 6] is DENIED and defendant's motion for summary judgment [Docket No. 11] is GRANTED.

SO ORDERED, this 12 day of August, 1994.

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL
JUDGE, UNITED STATES
DISTRICT COURT

APPENDIX C – JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, DATED AUGUST 15, 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MURRY COLVARD	:	
Plaintiff,	:	
vs.	:	**CIVIL ACTION NO.**
FULTON-DEKALB HOSPITAL AUTHORITY	:	**1:93-cv-2410-GET**
Defendant.	:	

JUDGMENT

This action having come before the court, the Honorable G. Ernest Tidwell, United States District Judge, for consideration of defendant's motion to dismiss, and the court having granted said motion, it is

Ordered and **Adjudged** that the plaintiff take nothing, that the action be dismissed in favor of defendant, and that defendant recover from plaintiff, costs of this action.

Dated at Atlanta, Georgia, this 15th day of August, 1994.

Luther D. Thomas, Clerk

By: /s/ Pam Shirley
Pam Shirley
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
August 16, 1994
Luther D. Thomas, Clerk

By: /s/ Pam Shirley
Pam Shirley
Deputy Clerk

(2)

Supreme Court, U.S.
FILED
APR 30 1996
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No. 95-1585

In The

Supreme Court of the United States

October Term, 1995

MURRAY COLVARD,

Petitioner,

vs.

FULTON-DEKALB HOSPITAL AUTHORITY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent requests that the Court deny the petition for writ of certiorari seeking review of an opinion of the Eleventh Circuit Court of Appeals, per curiam. (Petitioner's Appendix A) The Eleventh Circuit's decision affirmed the judgment of the United States District Court for the Northern District of Georgia which granted summary judgment to Respondent on all counts of Petitioner's Complaint. (Petitioner's Appendix B).

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1254(1) because it does not raise questions of importance which is in the public interest to have decided, and because there is no conflict between decisions of Federal courts of different circuits.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below

Petitioner was a supervisor employed by Respondent. He was accused of committing acts of sexual harassment. Respondent had a policy opposing sexual harassment and which established a procedure for investigating these types of claims. Under that procedure, the Employee Advocate, Ms. Pauline Farris, was responsible for investigating charges of sexual harassment. Her duties were to conduct an investigation and make a recommendation as to the appropriate disciplinary action to be taken.

After learning of charges against Petitioner, Ms. Farris spoke with the Charging Party, then contacted the Petitioner about the charges. When Ms. Farris met with Petitioner, she explained the charges against him and asked for his response to the charges. Upon concluding her investigation, Ms. Farris made a recommendation to Petitioner's supervisors that he be

terminated. The supervisors reviewed the evidence with Ms. Farris and accepted her recommendation.

After termination Petitioner requested a hearing pursuant to the Respondent's grievance procedure. Petitioner was afforded an evidentiary hearing at which he had the right to be represented by counsel, to present witnesses and documents, and to cross examine witnesses. The Hearing Committee issued a fourteen-page opinion which found sufficient evidence to support termination of Petitioner.

The facts presented above are essentially from the district's court order (Petitioner's App. B). The district court held:

> Because it is undisputed that on January 10, 1992, Farris gave Plaintiff notice of the charges against him and a chance to respond to those charges, the Court finds that Plaintiff's rights to pre-termination procedural due process have not been violated.

In addition, the Court found that even had the pre-termination process been inadequate in some way, Plaintiff was afforded sufficient post-termination process to cure any pre-termination defect:

> Furthermore, even if pre-termination due process was inadequate, Plaintiff's rights to procedural due process were not violated because the procedural remedies available to Plaintiff post-termination satisfied the requirements of procedural due process. *McKinney v. Pate,* 20 F.3d 1550, 1562.

The Eleventh Circuit affirmed this decision without opinion.

B. Correction of Misstatements in the Petition

In his Statement of the Case, Petitioner alleges that "he had no opportunity to meet with the decision-maker." (Petition, p. 2). While it is true that Petitioner did not have the opportunity to meet with all of the decision-makers during the investigation, he met with a decision-maker, Ms. Farris, who interviewed him and made the recommendation for termination.

Petitioner also alleges that he did not "know that Ms. Farris was going to make a recommendation based on the erroneous statement that he had previously sexually harassed an employee." (Petition, pp. 2, 3). This statement implies that Ms. Farris made her recommendation that Petitioner be terminated because of a previous charge of sexual misconduct brought against Petitioner. There is no basis for this statement in the record. The evidence is clear that Ms. Farris interviewed Petitioner and based on the charges, his responses to the charges, and the statement of a witness to the incident of sexual harassment, Ms. Farris concluded that Petitioner violated Respondent's sexual harassment policy.

REASONS FOR DENYING THE WRIT

I.

THE DECISION IS NOT IN CONFLICT WITH OTHER AUTHORITY.

Petitioner asserts that there is some conflict among the Circuit courts as to the interpretation of *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985). Petitioner alleges the Fifth Circuit's interpretation of *Loudermill* in *Thurston v. Dekle*, 531 F.2d 1264 (5th Cir. 1976), *vacated on other grounds*, 436 U.S. 901 (1978), requires that an employee have the right to

respond to the official charged with making a termination decision. According to Petitioner, this holding is in conflict with the Fourth, Sixth, Ninth, and Eleventh Circuits, which do not require a meeting with a decision-maker. *Riccio v. County of Fairfax, Virginia,* 907 F.2d 159 (4th Cir. 1990); *Loudermill v. Cleveland Bd. of Education,* 844 F.2d 304 (6th Cir.), *cert. denied,* 488 U.S. 946 (1988); *Nicholson v. Gant,* 816 F.2d 591, 598 (11th Cir. 1987); *McKinney v. Pate,* 20 F.3d 1550 (11th Cir. 1994).

Petitioner misconstrues the holding of *Dekle* and the basis for the Supreme Court's ruling in *Loudermill. Loudermill* requires that an adversely-affected employee have a meaningful opportunity to respond to charges against him. It does not require that the accused in an employment situation have the right to meet with each and every decision-maker. The Fifth Circuit in *Dekle* recognized that due process requires the employee have the opportunity to respond to the charges before disciplinary action is taken. However, the Fifth Circuit did not face the question of whether the opportunity to respond had to be before of each and every decision-maker. As that question was not specifically addressed in *Dekle,* there is no basis for Petitioner's argument that there is a conflict between the Circuit Courts.

On remand from the Supreme Court, the Sixth Circuit in *Loudermill* was confronted with the argument that Plaintiff Loudermill had not met with the decision-maker prior to the disciplinary action. Loudermill claimed he did not have a meaningful opportunity to respond to the charges because the person who had actual authority to discipline did not meet with him. The Sixth Circuit stated that while this argument had a nice ring, it was not always possible for an ultimate decision-maker to meet with the accused employee. Rather, the important aspect was that the claimant have a meaningful opportunity to respond to the charges in a fair process. *Loudermill v. Cleveland Bd. of*

Education, 844 F.2d at 311. Similarly, in *Los Angeles Police Protective League v. Gates, supra,* the court adopted the same line of reasoning stating:

> a contrary rule would require that the head of a department, no matter how large that department was, would be forced to meet with every employee who was subject to discipline.

907 F.2d at 891. *Dekle* is not in conflict with this reasoning.

The critical factor in any examination of due process is fundamental fairness. In the current case, Petitioner had the opportunity to present his defense before one of the decision-makers, Ms. Farris. Simply because the recommendation of Ms. Farris could have been rejected by superior officials employed by Respondent does not mean that he did not have an effective opportunity for presentation of defense. As stated by the Supreme Court in *Loudermill:*

> The essential requirements of due process, and all that Respondent seeks or the Court of Appeals require, are notice and an opportunity to respond.

470 U.S. at 546. As Petitioner was provided notice of the charges and had the opportunity to respond to one of the decision-makers, he received all due process required.

II.

APPROPRIATE POST TERMINATION DUE PROCESS MAY CURE PRE-TERMINATION DUE PROCESS VIOLATIONS.

Petitioner asserts that a violation of pre-termination rights cannot be cured by any post termination procedures. Petitioner suggests a strict rule that where a pre-termination violation occurs, no matter how inconsequential, a right to recover exists. Such an argument abandons the principle of fundamental fairness in favor of being technically correct. *Loudermill, supra; McKinney v. Pate,* 20 F.3d 1550 (11th Cir. 1994).

In *Parratt v. Taylor,* 451 U.S. 527 (1981) the Supreme Court held that due process does not require a pre-deprivation hearing where the holding of such a hearing would be impractical. All that due process requires, the Supreme Court stated, is a post deprivation "means of redress for property deprivations satisfy[ing] requirements of procedural due process." 451 U.S. at 537; *McKinney v. Pate,* 20 F.3d at 1563.

The Eleventh Circuit properly interprets *Parratt* for the proposition that even if a procedural deprivation occurs in the pre-termination process, it may be cured with appropriate post-termination procedures:

> Procedural due process violations do not become complete unless and until the state refuses to provide due process.

Id. at 1562. Thus, even if there were a technical violation in the pre-termination process, no procedural rights arise unless there is no way to redress that pre-termination violation.

In the case at bar, as cited by the district court opinion, there was ample redress to cure any pre-termination due process violation. The first step of redress was an evidentiary hearing before a grievance committee established by Respondent. In the event that Petitioner was dissatisfied with the results of that hearing, he had a right to petition the state courts pursuant to the certiorari procedures of Georgia O.C.G.A. § 5-4-1. That statute provides for certiorari to the State courts for errors committed by "any inferior judicatory or person exercising judicial powers." O.C.G.A. § 5-4-1. This procedure has been found to satisfy constitutional procedural protection. *Lee v. Hutson*, 810 F.2d 1030, 1033 (11th Cir. 1987); *Baxter v. Fulton DeKalb Hospital Authority*, 764 F. Supp. 1510, 1519 (N.D. Ga. 1991).

Moreover, even if Petitioner were correct that an adequate post-termination process cannot cure a technical pre-termination violation, that question does not need to be resolved in the current matter because Petitioner received pretermination procedures that comport with *Loudermill*; that is, notice and an opportunity to respond to the changes. Accordingly, the decision of the lower court is supported by the facts.

CONCLUSION

As the decision of the Eleventh Circuit is consistent with Supreme Court precedent concerning pre-termination due process, and as the facts demonstrate that Petitioner was afforded an opportunity to confront the charges against him and to respond to those charges prior to his termination, this writ of certiorari should be denied.

Respectfully submitted,

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